(29)

No. 95-1184

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,

Petitioner,

v.

WILEMAN BROTHERS & ELLIOTT, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC. IN SUPPORT OF RESPONDENTS

JOHN C. SCULLY
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

Attorney for *Amicus Curiae*

September 1996

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INTRODUCTION

Pursuant to Rule 37.3 of the Rules of this Court, the National Right to Work Legal Defense Foundation, Inc. ("Foundation") files this brief *amicus curiae* in support of respondents. All parties have consented to the filing of this brief; and their letters of consent have been filed with the Court.

INTEREST OF THE *AMICUS CURIAE*

The Foundation is a nonprofit, charitable organization that provides free legal assistance to individual employees who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their rights to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

The Foundation has supported the most recent of this Court's major cases involving the rights of employees to refrain from joining or supporting labor organizations as a condition of employment. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986); *Minnesota State Bd. v. Knight*, 465 U.S. 271 (1984); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In hundreds of other cases throughout the country, the Foundation is now aiding employees who seek to limit their forced association with unions and their financial payments to those unions.

Amicus National Right to Work Legal Defense Foundation believes that the decision of the U.S. Court of Appeals for the Ninth Circuit was correct. However, *amicus* will not analyze this case in terms of commercial speech, as did the Court of Appeals, but rather in terms of compelled speech and association. The Foundation believes that its role in supporting many of the most significant cases that have come before this Court dealing with compelled speech and association will provide a unique perspective on some of the issues raised by this case and will aid the Court in analyzing this case. Finally, the AFL-CIO filed an *amicus* brief in support of the Secretary of Agriculture. In that brief, the AFL-CIO misstated the law with respect to compelled speech and association. *Amicus*

National Right to Work Legal Defense Foundation will focus on some of the misstatements made by that organization.

STATEMENT OF THE CASE

The Secretary of Agriculture, pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, established marketing orders regulating nectarines, peaches, pears, and plums grown in California. A provision of the marketing orders imposed mandatory assessments on the handlers of this California produce to finance generic advertising of those agricultural products.

California nectarine, plum, and peach handlers challenged several aspects of the Secretary's marketing orders, including the mandatory assessments for generic advertising, by filing petitions with the Department of Agriculture. An Administrative Law Judge ("ALJ") granted the petitions but the Department of Agriculture Judicial Officer reversed the ALJ decision. The handlers sought judicial review. In an unpublished decision, the U.S. District Court for the Eastern District of California upheld the mandatory assessment program. An appeal was filed.

The U.S. Court of Appeals for the Ninth Circuit analyzed the case in terms of commercial free speech and applied the test set-forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The court ruled that the forced assessments violated the handlers' First-Amendment rights, *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995).

The Secretary of Agriculture petitioned this Court for a *writ of certiorari* and that petition was granted. The Secretary of Agriculture seeks reversal of the Ninth Circuit, arguing that the case should be analyzed in terms of compelled speech and association rather than commercial speech.

SUMMARY OF THE ARGUMENT

The handlers' speech is protected by the First Amendment of the United States Constitution. The First Amendment rights of the handlers can be analyzed in terms of commercial speech or compelled speech. *Amicus* will focus on the compelled speech analysis rather than the application of the commercial speech doctrine.

The First Amendment protects the right to refrain from speech and association, as well as the right to speak and associate. Corporations as well as individuals are protected by the First Amendment. That includes the right to refrain from speech. The protection afforded by the First Amendment to the right to refrain from compelled speech and association is not limited to political and ideological speech. It applies to *any* type of speech. Any compelled speech impinges upon First Amendment rights. The requirement that handlers finance generic advertising campaigns interferes with their ability to market their own label products.

Laws and regulations which interfere with First Amendment rights are subject to exacting scrutiny. That is true of cases involving compelled speech as well as those limiting speech. Since this case involves an interference with First-Amendment rights, the marketing orders which compel speech are subject to a high level of scrutiny.

The government bears the burden of showing that it has a compelling governmental interest that justifies the burden on the First Amendment rights of the handlers. The interest in this case is the sale of agricultural products. Private advertising may achieve that goal but generic advertising is not required to achieve that goal.

The government must use the least restrictive means to implement the program so as to minimize the impact upon First Amendment rights. In this case, the Secretary has not chosen the least restrictive means to implement an advertising

campaign to sell peaches, nectarines, pears, and plums. The least restrictive method is to permit the handlers to engage in their own advertising campaigns to promote their own products or utilize a voluntary generic advertising campaign.

ARGUMENT

THE COMPELLED SUPPORT FOR GENERIC ADVERTISING IS AN UNCONSTITUTIONAL INFRINGEMENT OF THE HANDLERS' FIRST AMENDMENT RIGHTS

I. Whether This Case Is Analyzed In Terms Of Commercial Speech Or Compelled Speech, The Result Is The Same.

Handlers of California grown nectarines, peaches, pears, and plums challenged the marketing orders which the Secretary of Agriculture promulgated pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*, which required them to finance generic advertising campaigns for those products. The handlers argued that the compelled financing of the advertising campaigns infringed upon their First Amendment rights. The U.S. Court of Appeals for the Ninth Circuit applied the commercial speech standards to this case and found that the compelled speech aspect of the marketing program could not withstand constitutional scrutiny.

The Secretary of Agriculture now argues that this Court should analyze this case in terms of compelled speech and association and that the compelled speech analysis will produce a different outcome. *Amicus* National Right to Work Legal Defense Foundation disagrees with the Secretary that a compelled speech analysis will produce a different result from that reached by the Ninth Circuit. If the case is analyzed in terms of compelled speech, the same result reached by the Court of Appeals will be obtained.

Commercial speech is entitled to First- Amendment protection, *44 Liquormart, Inc. v. Rhode Island*, ___ U.S._ 116 S. Ct. 1495 (1996); *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). However, while this Court has held that commercial speech is entitled to protection, it is subject to a less exacting standard of scrutiny than non-commercial speech, *Zauder v. Office Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

Since the Ninth Circuit found the Secretary's regulations cannot withstand constitutional scrutiny under the less stringent commercial speech standard, it follows that the compelled advertising campaign must fail under the more restrictive standard required under compelled speech and association cases. *Amicus* National Right to Work Legal Defense Foundation will not address the commercial free speech activity analysis but will limit its discussion to the compelled speech aspect of this case.

II. Marketing Orders That Compel Speech Implicate The First Amendment Right Of Corporations To Refrain From Speech and Association.

There can be no question but that a marketing order which forces agricultural product handlers to contribute to a generic advertising campaign compels speech. It is that compulsion that implicates First Amendment rights.

In its brief, *amicus* AFL-CIO attempts to diminish the handlers First Amendment protections by referring to "a supposed 'right' not to communicate." (AFL-CIO Br. at 19). The right to refrain from compelled speech is not "supposed," but fundamental. The First Amendment protects the right to refrain from speech and association, as well as the right to speak and associate. The principle underlying this Court's decisions in compelled speech cases is that just as the First Amendment to the Constitution protects the right of freedom of speech and association, so also it protects the right to refrain from compelled speech and association. *Keller v. State Bar*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Wooley v. Mayard*, 430 U.S 705, 713-15 (1977); and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The fact that the handlers are often corporations does not extinguish their right to refrain from speech. Corporations as well as individuals are protected by the First Amendment. *First National Bank v. Bellotti*, 435 U.S. 765 (1978). Similarly, corporations as well as individuals have the right to refrain from compelled speech and association. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986).

Furthermore, the nature of the speech—advertising—does not extinguish the protection afforded by the First Amendment. The constitutional right to refrain from compelled speech and association is not limited to political and ideological speech. It applies to *any* type of speech. For example, in the context of compulsory agency fees or union dues, this Court has held that requiring non-union employees to pay *any* union dues or any agency fee is "a significant impingement upon First Amendment rights." *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984). This Court has found that that is true whether the fees are used for political activities or solely for collective bargaining, since "the agency shop itself impinges on the nonunion employees' First Amendment interests." *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 309 (1986).

Amicus AFL-CIO argues in its brief that the range of compelled speech that is limited by the First Amendment is narrow and limited to core First Amendment values such as political and ideological expenditures. It falsely argues that this Court has taken a "generous view in considering whether the challenged group expenditures are within the legislature's contemplation, and in considering whether those expenditures are rationally related to the legislature's regulatory purpose." (AFL-CIO Br. at 17). The AFL-CIO has misstated the law.

This Court has made it clear that:

> our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters to take a nonexhaustive list of labels is not entitled to full First Amendment protection. Union members in both the public and private sectors may find that a variety of union activities conflict with their beliefs. [****] Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective "political" can be properly attached to those beliefs the critical constitutional inquiry.

Abood, 431 U.S. at 231-32.

Since *Abood*, this Court has not limited the protections afforded by the First Amendment to the right to refrain from political and ideological speech. This Court has **not**, as the AFL-CIO argues, taken a "generous" view in considering whether the compelled group's speech justifies infringing upon First Amendment rights. Instead, it has narrowly limited the types of compelled speech that can withstand constitutional scrutiny. The First Amendment does not just protect the right to refrain from compelled political and ideological expenditures, as the AFL-CIO argues. Rather, this Court has held that employees cannot be compelled to pay for a host of other activities including: organizing, *Ellis*, 466 U.S. at 451-53; extra-unit litigation, *id.* at 453 and *Lehnert*, 500 U.S. at 528; death benefits, *Ellis*, 466 U.S. at 455 n.15; charitable contributions, *Lehnert*, 500 U.S. at 524; and public relations, *id.* at 528-29 (Blackmun, J.) and *accord id.* at 559 (Scalia, J., concurring).[1]

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[1] *Amicus* AFL-CIO argues that once a governmental interest is found to justify the infringement on First Amendment rights, "that for the objector to make out a negative First Amendment claim he must also demonstrate that the complained-of compulsion is something over and above—something quantitatively different than—the compulsion inherent in the government's decision to require the group association in the first place." (AFL-CIO Br. at 16). That is not the case. It is the obligation of the group seeking the compelled association—not the objector to the compulsion—to prove that the compulsion is germane to the compulsion, justified by the governmental interest, and includes no additional significant infringement upon First Amendment rights. Beyond making an objection known, the objector has no burden. The burden falls upon the group seeking to collect the money. *Hudson*, 475 U.S. at 306 & n.16.

III. The Handlers Object To Financing A Generic Advertising Campaign.

The compelled speech interferes with the handlers' ability to market their own label products. *Wileman Brothers*, 58 F.3d at 1379. Compelling handlers to finance generic campaigns when they wish to emphasize the superiority of their own label products in essence forces them to support advertising campaigns that are counter to their own interests. Forcing handlers to finance the advertising campaigns of competitors is similar to the situation in *Ellis*, where this Court held that "it would be perverse to read it [the Railway Labor Act] as allowing the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members." *Ellis*, 466 U.S. at 452 n.13. Furthermore, the money the handlers are forced to pay for the generic campaigns diminishes the amount of money that they have to finance their own campaigns. *Wileman Brothers*, 58 F.3d at 1379.

It is clear that the First Amendment protects the right of corporations to speak and to refrain from speaking. Furthermore, the range of speech that is protected by the First Amendment from compelled speech is wide and not limited to political and ideological speech.

IV. Compelled Payments For This Generic Advertising Campaign Cannot Withstand Constitutional Scrutiny.

A. The compelled payments for the generic advertising campaign must be subjected to a high level of constitutional scrutiny.

What is the proper level of constitutional scrutiny this Court should use in examining the compelled speech imposed by the marketing orders? *Amicus* AFL-CIO, in its brief in support of the Secretary of Agriculture, misstates the standard. The AFL-CIO claims that the rights of individuals who exercise their right of non-association and object to compelled speech merely have "attenuated First Amendment claims." (AFL-CIO Br. at 6). Nothing is further from the truth. Laws and regulations which compel speech and association are subject to a high standard of scrutiny.

It is well settled that "a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod v. Burns*, 427 U.S. 347, 362 (1976). There is no distinction between the impairment of First Amendment rights created by compelled speech and the impairment created by limitations on the right to speak. *Abood*, 431 U.S. at 234. In compelled speech cases, this Court has subjected laws that impact upon the First Amendment to a high level of scrutiny. *Hudson*, 475 U.S. at 303 & n.11.

So also, in this case the infringement upon the First-Amendment rights of the handlers by the compelled advertising campaign should be subjected to a high level of scrutiny. As shown above, the First Amendment protects not only political and ideological speech but all speech. It is only if the government has demonstrated a compelling interest that justifies the infringement upon those rights that compelled speech can withstand constitutional scrutiny.

B. The generic advertising campaign is unconstitutional since it is not the least restrictive manner for the government to accomplish any compelling interest that justifies the compelled speech.

Since the handlers are protected by the First Amendment right to refrain from speech and association, a classic First-Amendment analysis must apply. The first prong of First-Amendment analysis is to determine whether there is a compelling state interest which justifies the infringement on the First Amendment right of non-association. *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 220-24; *Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Alabama*, 375 U.S. 449, 460-61 (1958). Compelled speech can **only** be justified if the state has a compelling interest that justifies infringement on the First Amendment. *Abood*, 431 U.S. at 220-24. Despite the burden placed on non-union employees by agency fees, the Court in *Abood* held that such fees could withstand constitutional scrutiny since the Court found that the state had an important interest in labor peace.

The government has the burden of showing that it has a compelling governmental interest that justifies the burden on the First Amendment rights of the handlers. Is there a state interest that justifies the imposition of compulsory payments for generic advertising campaigns? An infringement upon First Amendment rights can only be justified when there is evidence in the record of governmental interest. *DeGregory v. Attorney General*, 371 U.S. 415, 444 (1963). The government asserts that its interest is promoting the sales of agricultural products. *Amicus* suggest that sales promotion is not a compelling interest that justifies an infringement upon the handlers' First Amendment rights.

However, even if the state has a compelling interest that justifies the infringement upon First Amendment rights, the government must use the least restrictive means to implement the program so as to minimize the impact upon First-Amendment rights. *Hudson*, 475 U.S. at 303; *Kusper v.*

Pontikes, 414 U.S. 51, 59 (1973); and *Elrod v. Burns*, 427 U.S. at 362-63. In this case, the Secretary has not chosen the least restrictive means to implement an advertising campaign to sell peaches, nectarines, pears, and plums.

The least restrictive method to increase sales of those commodities is to permit the handlers to engage in their own advertising campaigns to promote those products. As the Ninth Circuit pointed out, the Secretary has not demonstrated that a generic advertising campaign is better at increasing consumption than individualized advertising. *Wileman Brothers*, 58 F.3d at 1379.

Advertising in the free market and not in state sponsored propaganda campaigns is more likely to increase sales of products. Furthermore, those handlers who wish to voluntarily join in a generic marketing campaign are free to do so. Those who choose not to join in but to engage in their own advertising will not be free riders. Instead, they will be competing with the generic products to produce their own labels. If anything, the handlers who participate in a generic campaign will likely benefit from the promotion of the product by the handlers who promote their own labels, and it would be the generic advertisers and not the individual label advertisers who would be the free riders.

V. The First Amendment Guarantees Freedom Of Speech And Not A Single-Government Mandated, Amplified Speech.

The stark difference between a system based upon free markets and free speech and a system based upon a state sponsored propaganda campaign is demonstrated by the argument made by *amicus* AFL-CIO. In its brief (Br. at 19), the AFL-CIO makes the bizarre claim that limiting compelled

speech is contrary to the values of the First Amendment.[2] It claims that limiting compelled speech contracts the range of communication. The First Amendment was not ratified in order to protect or foster compelled speech. The First Amendment protects freedom of speech. Compelled speech is not free. Using the AFL-CIO's rationale, a single view loudly and repeatedly broadcast is preferable to the free exchange of numerous and diverse opinions. That is not the goal of the First Amendment. Using that theory, a generic advertising campaign for individuals to buy autos is preferable to numerous auto manufacturers advertising their individual products. However, the one, loud bull-horn that the AFL-CIO seeks to award to government-designated groups is not preferable to the many voices of free people that the First Amendment protects. It is the freedom to speak, and not government compulsion to finance certain speech at a louder volume, that is the core value of the First Amendment.

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[2]This argument is reminiscent of the argument made by the American Federation of Labor in *Lincoln Federal Labor Union v. Northwestern Iron & Metal*, 335 U.S. 525 (1949), that right-to-work laws violate labor unions' First Amendment rights. In that case, this Court characterized the union's arguments as so "startling" that the Court did not need to analyze them, *id.* at 531. The argument made by the AFL-CIO in this case is so "startling" that if accepted, it in turn would make a mockery of the First Amendment.

CONCLUSION

This Court should affirm its holdings that corporations, like individuals, are protected by the First Amendment in their right to refrain from speaking and associating. This Court should rule that the forced contributions for generic advertising campaigns mandated under the Secretary of Agriculture's marketing order cannot withstand constitutional scrutiny.

Respectfully submitted,

John C. Scully
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road
Springfield, VA 22160
(703) 321-8510

Attorney for *Amicus Curiae*
National Right to Work Legal
Defense Foundation, Inc.

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